88- 1827

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Robert A. Bonser and
Cedar Waters Village, Inc.,
Petitioners,

v.

Town of Nottingham, New Hampshire,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Robert A. Bonser, Pro Se
RFD # 1, CWV
Durham, N.H. 03824
(603) 679-8658
679-2036

and

Thomas C. Dunnington, Jr.
Attorney for Petitioner
Cedar Waters Village
P.O. Box 842
Dover, N.H. 03820
(603) 742-1450

April 1989

32 pp

QUESTIONS PRESENTED

1. Whether in a state equity case, Fourteenth Amendment due process is offended, where the trial justice knows that he is related by blood to a party but refuses to disqualify himself as required by the Code of Judicial Conduct, adopted as law in New Hampshire, and the State Supreme Court disqualifies him prospectively but will not vacate his past orders complained of by Petitioners which were entered prior to their written complaint, such that this judge's orders in this case are either void, or voidable on motion, in this Court.

2. Whether the judicial disqualification found by the State court in this case is mandatory on the trial judge such that it cannot be waived as a matter of due process of law under said Fourteenth Amendment

to the Constitution of the United States.

3. Whether on the facts of this case Petitioners ever knowingly, intelligently or voluntarily abandoned or relinquished a known right or privilege to have a disqualified judge sit in their case, as a matter of federal law governing waiver of fundamental federal constitutional rights.

THE PARTIES

The parties are the Petitioners, Robert A. Bonser, and the New Hampshire corporation of which he is president, Cedar Waters Village, Inc., along with the Respondent, Town of Nottingham, a political subdivision of the State of New Hampshire, as set forth in the caption of this case in this Court.

Corporate Petitioner, Cedar Waters Village, Inc., has no parent companies, subsidiaries of any kind, nor any affiliates, within the meaning of Revised Rule 28.1, Rules of the Supreme Court of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Petitioners, Robert A. Bonser and Cedar Waters Village, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Hampshire entered in the above-entitled cause on December 9, 1988. This order is reproduced in the Appendix to this Petition.

OPINION BELOW

The prior opinions of the New Hampshire Supreme Court pertinent to this Petition and the judgment under review, was a two-page memorandum order dated March 3, 1988, and two one-page memorandum orders dated April, 22, 1988, in the State cases captioned Town of Nottingham v. Robert A. Bonser and Cedar

Waters Village, Inc., and numbered 86-005/ 86-255 & 87-457, respectively. These orders are reproduced in the Appendix to this Petition.

The judgment in this case consisted of the opinion and decision entered by the New Hampshire Supreme Court and reported in Town of Nottingham v. Bonser, ____N.H.____, 552 A.2d 58 (December 9, 1988), which became final when no motions for rehearing or reconsideration were filed within ten days of December 9, 1988.

A Report of the New Hampshire Supreme Court (Bois, J., Ret.), sitting as a master to find facts, dated February 19, 1988, upon which the aforesaid memorandum orders relied, is also included in the Appendix to this Petition.

JURISDICTION

The judgment of the Supreme Court of New Hampshire awarding Respondent equitable relief and attorneys fees in the approximate amount of $13,873.00 was entered on December 9, 1988.

By Order of this Court (Brennan, J.) the time for filing this Petition, absent further extension, was enlarged to include April 8, 1989.

This Petition is timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1257(3) and 2101(c), and Revised Rules 20.2 and 28.2, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Canon 3(C) of the Code of Judicial Conduct, adopted with the full force and effect of law in New Hampshire as Canon 3(C), Rule 38, New Hampshire Supreme Court Rules. Canon 3(C), governing disqualification of judges, is substantially equivalent to the provisions of 28 U.S.C. § 455 governing disqualification of Federal judges.

The New Hampshire Canon is set forth in the Appendix to this Petition.

The Code of Judicial Conduct, promulgated by the New Hampshire Supreme Court, has the force of statute law pursuant to the New Hampshire Constitution, Part II, Article 73-a.

The Code of Judicial Conduct has also been adopted by every other State jurisdiction in America.

STATEMENT OF THE CASE

A. SUMMARY OF PERTINENT FACTS

The basic facts necessary for a determination of the questions presented in this Petition are not in dispute.[1]

In an equity case involving a zoning controversy in the Town of Nottingham, N.H. over placement of low-income manufactured housing sought to be provided by Petitioners, the trial judge newly assigned to the Superior Court case in 1985 was, and knew he was, related by blood to the corporate secretary (his maternal uncle) of a party,

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1. The facts relied on herein were either admitted by the Respondent or trial judge, found by the State Supreme Court, and/or alleged by Petitioners and not disputed or further litigated below.

Cedar Waters Village, Inc. As such the judge was absolutely and per se disqualified to sit in the proceedings as a matter of law under Canon 3 (C)(1)(d)(i), Code of Judicial Conduct, Rule 38, New Hampshire Supreme Court Rules.

Moreover, the judge was not on speaking terms with his uncle, so hostile were the relations.[2]

The Petitioners had standing to complain about the judge's sitting in these circumstances, since his "[r]elationship or affinity to either party, though only a stockholder in a corporation...is a cause of recusation by either" party as a matter of law, and the "disqualifi[cation]" to

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2. The trial judge claimed privilege from testifying at an evidentiary hearing, was excused by the master, and the Supreme Court did not reach the issue of actual bias.

sit, "the disibility result[s] from the relationship." Moses v. Julian, 45 N.H. 52, 55-56 (1863), reaffirmed in State ex rel. Thomson v. State Board of Parole, 115 N.H. 414, 421 (1975).

Petitioners never waived their rights to a qualified judge. As soon as they became aware of the legal grounds for the trial judge's disqualification, they filed a motion to recuse, which the judge first ignored, and then denied, after rendering decisions on substantial matters in the meanwhile. Petitioners had appeared pro se up to the point of the motions to recuse.

B. PROCEEDINGS BELOW

In pending appeals from orders issued by the trial judge, Petitioners filed motions for summary reversal, raising the trial judge's disqualification for relationship to a party and actual bias toward Petition-

ers and their corporate secretary, the judge's uncle.

The Supreme Court of New Hampshire found the judge disqualified, recused him, and vacated his orders issued after Petitioners' motions for recusal. The State Court found that Petitioners had waived the issue of the judge's disqualification by not raising it earlier, when they knew of the blood relation (but not that these facts constituted a legal ground of recusation and per se disqualification).

The State Supreme Court later upheld the prior orders of the trial justice, which gave substantial equitable and monetary relief to Respondent in the form of an injunction, civil contempt findings, and award of attorneys fees and costs.

This petition for review followed.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH THE OPPORTUNITY TO CLARIFY AND EXPAND UPON ITS DECISION IN LILJEBERG V. HEALTH SERVICES ACQUISITION CORP, 108 S.Ct. 2194 (1988).

In Liljeberg the Court last Term upheld the Fifth Circuit Court of Appeals disqualification of a trial judge who "certainly should have known" of the facts constituting conflict of interest and mandating recusal under 28 U.S.C. § 455 (various subsections), and vacated his prior orders even though first raised by the petitioners many months after the judgment became final. Id., 108 S.Ct., at 2197-8, 2203, 2206.

This Court opined that "advancement of the purpose of the provision [of the Code

of Judicial Conduct governing disqualification] - to promote public confidence in the integrity of judicial process" required that the "provision...be applied retroactively" to "rectify [the] oversight" on the judge's part in not recusing himself in the first place, "reopening of closed litigation," and "vacating" the judge's "judgments." Id. at 2202-03.

Important to the Court was the time-honored proposition that "to perform its high function in the best way 'justice must satisfy the appearence of justice.'" Id., at 2204, quoting In re Murchison, 349 U.S. 133, 136 (1955). "The problem [] is that people who have not served on the bench are often too willing to indulge suspicions and doubts concerning the integrity of judges." Id., at 2204-05 & n. 12. "[T]his concern has constitutional dimensions," where, as here, actual bias is

alleged and not denied. Ibid, at n. 12, citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). "The Due Process Clause [of the Fourteenth Amendment] 'may sometimes bar trial judges who have no actual bias" but "appear" to have a conflict of interest which "would offer a possible temptation to the average [judge] ...[to] lead him not to hold the balance nice, clear and true.'" Liljeber, ibid, n. 12 (citations omitted)(elipses and brackets in original).

In Liljeberg, this Court set forth standards for determing when retroactive vacating of a disqualified judge's past orders is appropriate. Among the factors to be considered is whether Petitioners "ma[de] a timely request for relief," id. at 2206, i.e., whether "the motion to vacate was filed as promptly as possible," id., at 2198. In this regard, the Court

held that it is important to consider whether the judge made a "full disclosure" of facts he knew or should have known might require his recusal, id., at 2205.

In your Petitioners' case, it is not disputed and the record plainly shows that the trial judge made no disclosure whatsoever of the grounds he should have known required his recusal.

Petitioners' reason for any "delay in filing a motion for recusal" while the trial proceedings were in progress was that "[they] did not know of the rule that [they] interpret as requiring disqualification until shortly before [they] filed such a motion." Report of N.H. Supreme Court Master (Bois,J., Ret.), post, at A-2 — A-17 . It is not contested that Petitioners did file the motions for recusal before the orders complained of became

"final," id., at 2198, and thereafter brought the claims to the N.H. Supreme Court in pending appeals, cf., id., at 2204 n. 11, both held to be "reasonable" time periods in this regard.

Petitioners, being pro se at all times relevant to the foregoing, brought their motions for recusal "as promptly as possible," i.e., within a few days of learning of the legal ground for recusal involved, and promptly made the motion for summary reversal in the State Supreme Court soon thereafter. As in Liljeberg, the trial judge here "den[ied] the motions" to recuse, cf., id., at 2206, but the appellate court found the judge disqualified, cf., id., at 2198, 2202.

This Court concluded in Liljeberg that any "delay is attributable to [the] Judge-['s] inexcusable failure to disqualify him-

self...or even disclose [his] interest in the case at [an earlier] time," id., at 2207, and the "guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact," ibid, quoting Public utilities Comm'n v. Pollak, 343 U.S. 451, 466-467 (1952) (Frankfurter, J., in chambers).

Petitioners respectfully submit that the decision of the Supreme Court of New Hampshire in this matter contravenes due process of law[3] and is in conflict with the teachings of this Court in Liljeberg, for the reasons aforesaid.

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3. Where every federal and state jurisdiction in America has adopted these provisions of the Code of Judicial Conduct, they have now become part of the fabric of the ordered liberty deemed fundamental to our system of justice and hence part of due process of law.

B. THE NEW HAMPSHIRE SUPREME COURT HAS DECIDED THE FEDERAL QUESTION OF WAIVER OF JUDICIAL QUALIFICATION IN A WAY IN CONFLICT WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS

The State Court held that Petitioners had "waived" their right to challenge the disqualified judge's prior ruling because they kn[ew] of the facts but file[d] no timely motion for recusal." Order in No. 86-005/86-255, dated March 3, 1988, post, at A-21 — A-25 . The New Hampshire Court overlooked the finding of its Master, aforecited, that Petitioners filed the motions to recuse as soon as they knew the legal basis for the motion, being pro se at the time.

The Courts of Appeals have found that the provisions of disqualification here at issue are "mandatory," "automatically" require "sua sponte" recusal by a trial judge, are per se to be followed, and the

issue may be raised on appeal , never having been presented to the trial court, so important is the Code of Judicial Conduct to the appearence of judicial integrity. See especially, SCA Services v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) ("rights to enforce" code disqualification cannot be "waived;" "no duty on the parties to seek disqualification;" no "time limits within which disqualification must be sought"). Compare, Liljeberg, 108 S. Ct., at 2205 (judge was "under a duty to recuse himself before he entered judgment") (emphasis in original). See also, Moody v. Simmons, 858 F.2d 137, 142-3 (3rd Cir.1988) ("a judge is automatically recused upon the existence of certian familial and/or financial relationships," as distinct from the more general claims of "appearence" of partiality under the Code of Judicial Conduct; "to the extent that" the grounds

"mandated recusal after the order, they must also mandate recusal before"); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1114- 1115 (5th Cir.1980)("kinship" requires "automatic disqualification" which "cannot be waived;" in dicta: "no duty on the parties to seek disqualification, nor any time limits within which disqualification must be sought;" question not reached: "whether reversal on this ground alone would be foreclosed by Port City's failure to raise the issue of disqualification"); Easley v. Univ. of Michigan Bd. of Regents, 853 f.2d 1351, 1356-1358 (6th Cir.1988)(Code section is "self-executing, requiring the judge to disqualify himself for personal bias even in the abscence of a party complaint...recusal is mandated...sua sponte;" issue can "be[] raised initially on appeal," citing Liljeberg, Noli v. C.I.R., 860 F.2d 1521 (9th Cir.1988)("Failure to move for

recusal at the trial level [] does not preclude raising on appeal the issue or recusal under" the Code of Judicial Conduct, but "if no motion is made to the judge...a party will bear a greater burden on appeal in demostrating that the judege...[erred] in failing to...recus[e] under" the Code; question of trial judge's actual bias or partiality heard by Court of Appeals, id., at 1527).

In your Petitioners' case, they bore this additional burden because their claimed grounds for recusal were not rebutted, and the appellate court in New Hampshire actually disqualified the trial judge for cause.

For all of the foregoing reasons, it was error of constitutional magnitude for the Supreme Court of New Hampshire to rule that Petitioners "waived" their fundamental

right to an impartial judge.

C. THE NEW HAMPSHIRE SUPREME COURT HAS DECIDED THE FEDERAL QUESTION OF WAIVER OF FEDERAL CONSTITUTIONAL RIGHTS IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The right to an impartial, qualified judge, free of disabling conflicts of interest and actual bias, is unquestionably a "concern [that] has constitutional dimension" under the "Due Process Clause." Liljeberg, supra, 108 S.Ct., at 2205 n. 12.

Under applicable cases of this Court, "[t]he question of an effective waiver of a federal constitutional right is of course governed by federal standards." Boykin v. Alabama, 89 U.S. 238, 244 (1969). These standards apply "in the civil no less than in the criminal area, [and] courts endulge every reasonable presumption against waiver."

Fuentes v. Shevin, 407 U.S. 67, 94-95 & n. 31 (1972).

The federal standard for finding a waiver of federal due process rights, make it "incumbent upon the State to [find] 'an intentional relinquishment or abandonment of a known right or privilege,'" and this "waiver" must be found to have been "voluntarily, knowingly and intelligently" made. Brewer v. Williams, 430 U.S. 387, 403-404 (1977), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938), also relied on in Fuentes v. Shevin, supra.

The New Hampshire Supreme Court made no findings of fact sufficient to rule that Petitioners "waived" their due process right to a qualified, impartial judge. See, Order of March 3, 1988, post, but merely concluded that their "inaction [wa]s tantamount to waiver." Id. The State Supreme

Court master found, conversely, that Petitioners' delay in filing a motion for recusal" was "explain[ed]" by the fact that they "did not know of the rule that [they] interpret[] as requiring disqualification until shortly before [they] filed such a motion." See, Report of February 19, 1988, post.

Clearly, under the federal standards of waiver, in these circumstances, Petitioners did not intentionally abandon or relinquish a known right or privilege, and such knowledge cannot be imputed to them where they were pro se laymen. The trial judge, however, was an experienced lawyer and jurist of many years — it is not disputed — and plainly should have recused himself under the Code of Judicial Conduct.

CONCLUSION

For all of the foregoing reasons, the judgement of the Supreme Court of New Hampshire should be reversed, and the orders of the trial judge vacated, with the cause remanded for retrial before another judge (who has already been assigned by the New Hampshire Superior Court).

In the alternative, the cause should be remanded for further evidentiary hearing on whether Petitioners "waived" their rights to an impartial and qualified judge in the circumstances of this case, under federal standards of waiver discussed above.

Respectfully submitted,

April , 1989

Robert A. Bonser, Pro Se
RFD # 1, CWV
Durham, N.H. 03824
(603) 679-8658
679-2036

April , 1989

Thomas C. Dunnington, Jr.
Attorney For Petitioner
Cedar Waters Village,Inc.
P.O. Box 842
Dover, N.H. 03820
(603) 742-1450

AFFIDAVIT OF FILING AND SERVICE

I hereby declare under penalty of perjury that I am a member of the Bar of this Court, and that I filed the requisite number of copies of this Petition with the Court by mailing the same, first class, postage pre-paid, from New Hampshire, on April , 1989.

At the same time, I mailed the requisite number of copies hereof to opposing

counsel, Mark S. Gearreald, Esq., P.O. Box 278, Exeter, N.H. 03833, and a curtesy copy to the New Hampshire Supreme Court, Noble Drive, Concord, N.H. 03301, also by first class mail.

_____
Thomas C. Dunnington

STATE OF NEW HAMPSHIRE

, SS.

Then came the above-named Thomas C. Dunnington, Jr., personally known to me, and upon his oath declared that the foregoing affidavit of filing and service signed by him was true and correct, under penalty of perjury.

April , 1989

_____
NOTARY PUBLIC/JUSTICE
OF THE PEACE